

Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: February 25, 1997

CASE NO: 95-INA-263

In the Matter of:

ABLE TRANSPORTATION
Employer,

On Behalf of:

TERESA WYSOCKA
Alien

Appearance: E. S. David, Esq.
New York City, New York
for the Employer and the Alien

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Tersa Wysocka (Alien) filed by Able Transportation (Employer) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated in 20 CFR, Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Atlanta, Georgia, denied the application and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Statutory authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of

the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

Application. On October 29, 1993, the Employer applied for labor certification to enable the Alien, a Polish national, to fill the position of manager of office operations for a taxi-limousine service located in Orlando, Florida. The duties of the job offered were described as follows:

Manage operations of store (sic), supervise customer relations, plan work schedules, hire and fire employees, deposit cash & check receipts, coordinate pick up of passengers at airport and Disney World with drivers. Plan price schedules.

Employer required that the Employee must be fluent in Polish. In addition, the qualifications included a high school education and two years of experience were required. The wage rate offered was \$8.00 per hour, and the hours were 9:00 A.M. to 5:00 P.M. AF 99.¹

Richard A. Dora, Tami Harine, Fred Szukala, and Robert Joskey applied for or were referred for this job after it was listed with the state employment service and advertised in an Orlando newspaper. None of these four U. S. workers was hired by the Employer. AF 56. Mr. Dora, who was a college graduate with substantial business experience and who was fluent in Polish, asked for an interview but apparently was not interviewed. AF 108-110.² The Employer interviewed Mr. Szulka by telephone, but

¹Noting that the Alien's application listed only 23 months of experience and no high school education, the Florida Department of Labor and Employment Security indicated that she did not meet the qualifying criteria for this job in Employer's advertisement. AF 74, 81, 89, 91, 101, 117-118. While the experience requirement was met by AF 118-119, the file contains no indication of the Alien's formal education.

²Although Mr. Dora's name also is spelled as "Doroba" in some file items, no correction or change will be made, and the name "Dora" will be used, as in the correspondence about him.

he was not offered the job. AF 112. In accounting for these respondents, the principal of the Employer said he did not hire any of the U.S. workers because he interviewed the applicants and concluded that they did not know Polish, which he regarded as a critical requirement for this job. AF 115. Mr. Joskey was neither contacted nor interviewed by the Employer, and the CO's record did not include a report of Employer's contact with Ms Harine. AF 111.³

Notice of Findings. On September 9, 1994, the CO issued a Notice of Findings advising the Employer that the Department of Labor intended to deny the application, and permitting rebuttal of the findings or to remedy the defects noted on or before October 14, 1994. 20 CFR § 656.25(c). Using the job title of "Administrative Assistant," the CO addressed defects arising under 20 CFR § 656.21(b)(2)(i), and said Employer failed to establish the business necessity of the language requirement by the documentation of record.⁴

Employer's principal had previously stated his position in his April 22, 1994, letter:

I need a worker which can communicate in Polish and is able to do all the things provided by me. Polish language is needed to serve Polish tourists groups (21%) coming to sightseeing attractions of Central Florida.

The CO said this statement was insufficient evidence of business necessity, explaining that Employer must provide such documentary evidence as studies, client lists, phone records, etc., in order to support these statements. Absent such documentation, the CO concluded that the Employer's Polish language requirement was unduly restrictive under 20 CFR § 656.21(b)(2)(i). The CO then explained that the regulations strictly prohibit restrictive job requirements unless business necessity is clearly documented, saying,

To establish business necessity an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner. Mere inconvenience to the employer or somewhat higher

³The CO did not include the resumes of Mr. Szulka and Mr. Joskey when this file was transmitted.

⁴20 CFR § 656.21(b)(2)(i). The job opportunity requirements, unless adequately documented as arising from business necessity: (A) Shall be those normally required for the job in the United States; (B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.)...; (C) **Shall not include requirements for a language other than English.** ..." (Emphasis added.)

operating costs arising from the use of a worker who does not meet the requirements in question does not amount to business necessity. AF 53.

It is well established that the Employer must demonstrate a link between this job requirement and the Employer's business and that this job requirement is related to the job duties the employee must perform. **Sysco Intermountain Food Services**, 88-INA-138(May 31, 1989). For example, Employer's documentation must explain (1) how the foreign language will be used in executing the duties of this job, (2) where and when the language will be used by the Employee and with whom, (3) how the work of the position was completed in the past without the use of the language by an Employee in this job, (4) whether the absence of the Employee's fluency in the language will have an adverse impact on the Employer's business, (5) how the need for the use of the foreign language is handled with other ethnic groups, and (6) the proportion of the Employer's business that is dependent on the use of the language at issue.

Rebuttal. Employer's response and other statements in the file indicated that the Employee would communicate by letter and telephone with customers and others in Poland and would deal with Polish nationals who were touring in the United States and required transportation by the Employer to and from locations in the area it serves. In rebuttal the Employer filed pictures of the vehicles it used for transportation, a copy of its rate sheet in the Polish language, and photos of the office location where the Employee will work. AF 43-46.⁵ The Employer's principal explained that he had handled the Polish speaking clients himself in the past, but that the expansion of his business now required him to delegate this phase of the work to a manager. AF 08.

Final Determination. After examining the arguments and documentation that Employer filed as rebuttal, the CO denied this application for certification on November 30, 1994. The reasons given were that there are U. S. workers available who are able, willing and qualified for the job. In addition, the Employee had failed to meet the requirements of 20 CFR 656, in that its Polish language requirement was unduly restrictive because the Employer had failed to establish that it was a business necessity with adequate or sufficient supporting evidence.

Discussion. Arguing facts that are beyond the scope of its rebuttal evidence, Employer's brief contends that its calls to Poland were necessary because they are made to the person who generates the Polish speaking customers who constitute some 20%

⁵Employer also transmitted copies of tax returns and business licenses, all of which indicated that the Employer was engaged in the business it described in its application.

of its business and is a partner in the firm. AF 02. Regardless of whether these facts were properly presented, the issue turns on whether or not the Employer documented the unavailability of Mr. Ruminski, Employer's principal, to handle this part of the job, since he said in rebuttal that the expansion of the business required that his Polish language contacts be delegated to the manager that Employer wishes to hire. See AF 08.

Assuming that the Polish language demands of the business have been met in the past by Mr. Ruminski and that Mr. Ruminski no longer will be available to perform such work because of the Employer's plans to expand its business, the Employer failed to document a credible and realistic expansion that is either planned or in existence which will establish the need for another person in its office who can speak Polish. **Ommy Imports International, Inc.**, 94-INA-457(Oct. 13, 1995). The reason is that the Employer's proof failed to address such proof or to present the facts essential to demonstrate the business necessity of a Polish speaking manager for the business expansion it now asserts. **Simcha Productions**, 93-INA-545(July 17, 1995). More specifically, Employer failed to document the business expansion it has alleged as its primary reason for hiring a Polish speaking manager to assist its principal. **Washington Accounting Group**, 93-INA-197(May 24, 1994), citing **Remington Products, Inc.**, 89-INA-173(Jan. 9, 1991)(en banc); and see **Advanced Digital Corp.**, 90-INA-137(May 21, 1991).

In addition, however, the record contains evidence that one or more of the U. S. workers who indicated an interest in this job did speak Polish. Employer's report on the interviews or other disposition of these applications did not acknowledge this fact or otherwise indicate that its Polish language requirement was met, notwithstanding the fact that this requirement was unduly restrictive. It follows that the Employer has not sustained its burden of proving that the requirements of 20 CFR, Part 656 have been met under § 212(a)(5) of the Act by evidence that there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the Alien is to perform such labor. For this added reason it is further concluded that the requirements of 20 CFR, Part 656 have not been met.

Conclusion. The Employer's proof of the business necessity was not demonstrated in accordance with the NOF, based on the evidence discussed above. Also, the Employer has not established the unavailability of U. S. workers who are able, willing, qualified, and available to perform the job as advertised and that the requirements of 20 CFR, Part 656 have been met.

Consequently, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **ABLE TRANSPORTATION, Employer**
TERESA WYSOCKA, Alien

Case No. : 95-INA-263

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Holmes	:	:	:	:	:	:	:
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Huddleston	:	:	:	:	:	:	:
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Thank you,

Judge Neusner

Date: January 22, 1997